RHB BANK BHD

v.

FAUZUN ABDUL SAMAD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL ALIM ABDULLAH JC
[CIVIL SUIT NO: D3-22-653-1996]
15 JUNE 2007

CONTRACT: *Term loan facility - Demand and termination of - Failure to make monthly repayments - Whether plaintiff must terminate facility so as to be entitled to payment by defendant - Whether defendant issued with a written notice in accordance with terms of facility agreement - Whether there was evidence that a demand and termination of facility was communicated to defendant - Whether plaintiff's case failed*

The plaintiff was a financial institution that had granted the defendant at the latter's request, a term loan facility ('facility') in the sum of RM2,000,000. The plaintiff made full payment of the facility after a drawdown notice was issued by the defendant. The plaintiff contended that the defendant had breached the terms of the facility agreement when he failed to make the monthly repayments. A letter of demand was issued by the plaintiff's solicitors to the defendant claiming RM2,280,332.81 together with interest. The issues that arose were: (a) whether the plaintiff, prior to the expiry of the facility, must first terminate the facility so as to be entitled to payment by the defendant of the amount claimed; (b) whether the plaintiff had terminated the facility by issuing the defendant a written notice in accordance with the terms of the facility agreement; (c) whether the plaintiff was, when it filed this suit, entitled to the amount claimed before the expiry of the facility without having first issued a written notice to the defendant to terminate the facility, in other words, whether the plaintiff's suit was premature.

Held (dismissing the plaintiff's case with costs):

(1) PW1, under cross examination, admitted that he had no personal knowledge and no documentary evidence as to whether the demand letter demanding RM2,052,790.74 (P4), letter of termination and demand (P5) and letter of demand for the amount of RM2,280,332.81 (P13)were ever sent to the defendant. It would be ludicrous for one to say that there was

A evidence that a demand and termination of the facility had been communicated to the defendant. The plaintiff in its statement of claim had made no mention of a termination of the facility. (paras 7 & 8)

B **(2)** The evidence before the court was that there was in fact no termination of the facility at anytime, let alone a demand made upon the defendant. The submission by the plaintiff's counsel that the filing of the suit herein was in itself to be construed a demand or termination of the facility was inconceivable C against the background of the express terms of the facility agreement. (para 10)

(3) There was unchallenged evidence that the said letters had never been served on the defendant as expressly required by the facility agreement, let alone any evidence that they were D even posted. The plaintiff's case failed at the threshold and hence a flaw in its entirety. (para 12)

Case(s) referred to:

Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors E *[1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614 HC* ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(refd)***

North Central Wagon & Finance Co Ltd v. Graham [1950] 1 All ER 781 ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong F *Yik Bank Berhad [1989] 3 MLJ 155* ***(refd)***

Public Bank v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(refd)***

For the plaintiff - Harjinder Kaur; M/s Sharizat Rashid & Lee
For the defendant - Haris Ibrahim (Sunil Lopez with him); M/s Haris & Co

G *Reported by Suhainah Wahiduddin*

JUDGMENT

H **Abdul Alim Abdullah JC:**

[1] The plaintiff is a financial institution that had granted the defendant at the latter's request, a term loan facility ("facility") in the sum of RM2,000,000. The letter of offer dated 14 September 1993 addressed to the defendant is at pp. 1-7 of the I agreed bundle of documents (ABD pp. 1-7 refer). A facility agreement between parties was formalized between them (ABD pp. 8-47 refer).

[2] The plaintiff made full payment of the facility on 12 October 1993 after a drawdown notice dated 22 September 1993 was issued by the defendant. The plaintiff contends in para. 6 of its statement of claim that the defendant breached the terms of the facility agreement when he failed to make the monthly repayments. A letter of demand dated 6 June 1996 was issued by the plaintiff's solicitors to the defendant claiming RM2,280,332.81 together with interest (para. 7 of statement of claim refers).

[3] The issues called into question before this court are set out as follows:

(a) whether the plaintiff, prior to the expiry of the facility, must first terminate the facility so as to be entitled to payment by the defendant of the amount claimed.

(b) whether the plaintiff had terminated the facility by issuing the defendant a written notice in accordance with the terms of the facility agreement.

(c) whether the plaintiff was, when it filed this suit on 26 September 1996 entitled to the amount claimed before the expiry of the facility without having first issued a written notice to the defendant to terminate the facility, in other words, whether the plaintiff's suit is premature.

[4] It is worthwhile to note the salient provisions of the facility agreement. It will make easy, a *fortiori*, a better understanding of the respective legal contractual positions of parties herein. The relevant clauses are set out below:

Section 3.02 Tenure

The Facility hereby granted by the Bank shall be for a maximum period of Three [3] years or Thirty Six [36] months from the date of first drawdown. [ABD page 14 refers]

Section 12.01 Events of Default

The Bank may, by written notice to the Borrower terminate the Facility whereupon the principal, interest and all other sums payable by the Borrower under this Agreement shall be repaid or paid to the Bank within fourteen [14] days of the notice upon the occurrence of any of the following events:

(a) if the Borrower fails to pay any sum due under this Agreement on the due date; or

...

[ABD pages 28-30 refer]

Section 12.02 Repayable on Demand

Notwithstanding anything to the contrary herein contained the Bank shall have the right to terminate the Facility and upon such termination, such undrawn portion of the Facility or any part thereof shall be treated as cancelled, and the Bank shall further be entitled thereafter by notice in writing to the Borrower to declare that the Facility and all other sums payable pursuant to this Agreement have become immediately due and payable and the Borrower shall immediately pay the same to the Bank.

[ABD page 30 refers]

Section 18.01 Notices

(a) Any demand for the payment of the monies covenanted herein to be paid by the Borrower and any notice or request required or permitted to be given or made under this Agreement to the Bank or to the Borrower shall be in writing and in the case of the Bank shall be under the hand of a Manager or Officer of the Bank or a solicitor or firm of solicitors purporting to act for the Bank to the addresses specified below:

For the Bank:

Rakyat Merchant Bankers Berhad
9th Floor, Bangunan Angkasaraya
Jalan Ampang, P.O. Box 12346
50450 Kuala Lumpur.

For The Borrower:-

Fauzun Bin Abdul Samad
[NRIC NO: 3866802]
Perikanan LKPP Fort Sdn Bhd
Suite 2, Tingkat 11, Kompleks Teruntum
Jalan Mahkota
25000 Kuantan
Pahang.

(b) Any such demand notice or request shall be deemed to have been sufficiently given or made if sent by ordinary/registered post, telex, telegram, cable or telefax and addressed as aforesaid or at the respective last known addresses or at telex number as may from time to time be notified by the Borrower or the Bank (as the case may be) and shall be deemed to have been served on and duly received by the other party in respect of delivery by hand, at the time of such delivery, and if by registered or by ordinary mail it shall be deemed to have been given upon the expiry of five [5] days after the mail, if sent by cable or telegram the notice shall deemed to be given upon the expiry of twenty four [24] hours and any notice or request sent by telex or telefax shall be deemed to be given at the time of the transmission and such notices shall be subsequently confirmed by letter posted or delivered as soon as practicable thereafter.

[ABD pages 42-43 refer]

[5] The tenure of the facility is three (3) years from the date of drawdown which is 12 October 1993 (according to PW1) and its expiry being 11 October 1996. As clearly stated pursuant to section 12.01 of the facility agreement, the defendant maintains simply that prior to the expiry of the facility the plaintiff would only be entitled to the amount claimed if the plaintiff had first terminated it in compliance with the said section 12.01 (see para. 4 above for the terms therein).

[6] There is no dispute that the defendant has failed to pay the amount due under the facility on its due date. There is also no issue that the plaintiff is entitled to terminate the facility and demand the amount outstanding from the defendant during the tenure of the facility. It is the contention of the plaintiff that such a demand and termination is not a pre-requisite to commencing a suit as it is by itself to be construed to be a demand or termination of the facility.

[7] PW1 in giving evidence claimed that the plaintiff had sent the defendant a demand letter dated 17 January 1995 (P4) demanding RM2,052,790.74. He too says that the plaintiff's solicitors had sent a letter of termination and demand (P5) for the amount of RM2,088,060.28. Under cross-examination PW1 was straightforward enough to admit that not only that he had no

personal knowledge about the matter but also that there is no documentary evidence as to whether P4 and P5 were ever sent to the defendant. PW1 was also courageous in testifying further that the plaintiff's solicitors had similarly sent a letter of demand dated 16 June 1996 (P13) for the amount of RM2,280,332.81. In like manner, under cross-examination PW1 confessed that similarly there is no evidence that it was ever sent to the defendant.

[8] To this end, can one say that there had been in fact evidence that a demand and termination of the facility had been communicated to the defendant. It would be ludicrous for one to say so. PW1's claim appears to be absurdly fanciful as it stood unsupported. It is no wonder that the plaintiff in its statement of claim makes no mention of a termination of the facility.

[9] Counsel for the plaintiff argued that there is no general rule that in all cases, a prior precise demand is a *sine qua non* to the commencing of an action. Counsel relied on the authority of *Public Bank v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 (a decision of Shankar J as he then was) for the above proposition and the ratio that the writ itself is a notice. As against this, one needs to only refer to a decision of *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155. The latter case was decided by the High Court at first instance by the same learned judge in the *Public Bank case (supra)* which found no favour on appeal to the Supreme Court then. At p. 157 the Supreme Court observed as follows:

> We are *unable to agree* with the views of the learned judge in this case *that no antecedent demand was required to create a cause of action and the mere filing of the writ and service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is condition precedent to establishing a claim against a guarantor.* (emphasis added).

[10] It is also worthwhile to note that the Supreme Court in the oft-cited case of *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* [1987] 2 MLJ 610 had decided:

> Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but **make the demand a condition precedent to suing the guarantor.** (emphasis added).

Now, what is conspicuous yet remarkable in the present case is the relevant provision in section 12.02 of the Facility Agreement (see para. 4 above for the terms therein).

The terms therein obviously speak plainly of the conditions, namely that before the plaintiff is entitled to the amount claimed, it is required to:

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(i) terminate the facility, and

(ii) to serve a written notice of demand to the defendant.

The evidence before the court is that there was in fact no termination of the facility at anytime, let alone a demand made upon the defendant. The submission by the plaintiff's counsel that the filing of the suit herein is in itself to be construed a demand or termination of the facility is inconceivable against the background of the express terms of the facility agreement and the authorities cited above.

[11] Counsel for the plaintiff also volunteered a subtle argument that there was no need for the termination of the facility as the drawdown was in a lump sum as opposed to disbursements in stages. Upon a scrutiny of section 12.01 of the facility agreement there appears to be no such distinction between a default in a situation where there had been a lump sum drawdown and one where disbursements had been made. (see para 4 above for the terms therein).

The authority of *Fui Lian Credit & Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1991] 2 CLJ 522; [1991] 2 CLJ (Rep) 614 which was relied upon by counsel for the plaintiff nevertheless make plain that if required by the agreement, notice is essential in determining an agreement. Chong Siew Fai J (as he then was) said at p. 525:

> *Whilst it is true that there is no evidence of the plaintiff giving notice determining the agreement, in the absence of statutory requirement, such notice is,* in my view, *not essential* and the plaintiff was not obliged to give notice of termination to the lessee *unless so required by the agreement.* (emphasis added).

In yet another authority relied upon by counsel for the plaintiff but does not in fact warrant an argument in his favour is *North Central Wagon & Finance Co. Ltd. v. Graham* [1950] 1 All ER 781. Reading this case it would appear that the Court of Appeal there

had construed the hire purchase agreement of what the law would be in the absence of an express provision, wherein the said cl. 7(i) of the agreement does not require notice as a condition precedent to the exercise by the plaintiffs of their right to terminate the hire. In the present case before me there are precise and explicit provisions as to the requirement as to the giving of notices of termination and demand (undeniably in plain sight of section 12.02 of the facility agreement referred above).

[12] Hence the staring unchallenged evidence at the conclusion of the trial that bear certainty that the letters in P5 and P13 had never ever been served on the defendant as expressly required by the facility agreement, let alone any evidence that they were even posted. The plaintiff's case fails at the threshold and hence a flaw in its entirety and shall stand dismissed with costs.